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Supreme Court, U.S.
FILED
MAY 13 1992
OFFICE OF THE CLERK

No. 91-1639

In the Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL A. NELSON, PETITIONER

v.

SENATOR SAM NUNN'S OFFICE

MICHAEL A. NELSON, PETITIONER

v.

SENATOR WYCHE FOWLER'S OFFICE

MICHAEL A. NELSON, PETITIONER

v.

CONGRESSMAN RICHARD RAY'S OFFICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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MAY 1992

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Respondents, the offices of two United States Senators and one Member of the House of Representatives, submit this opposition to petitioner's petition for certiorari. The petition seeks review of the Eleventh Circuit's affirmance of the district court's dismissal of petitioner's complaints seeking relief against these offices of the Senate and the House of Representatives under the Freedom of Information Act, 5 U.S.C. § 552 (1988), and the Privacy Act, 5 U.S.C. § 552a (1988). The Eleventh Circuit's determination

that the Freedom of Information Act and the Privacy Act do not apply to records maintained by Senators' or Congressmen's offices presents no difficult questions warranting this Court's review.[1]

STATEMENT OF THE CASE

Appearing pro se, the petitioner filed three similar suits against the congressional offices of Senator Sam Nunn, Senator Wyche Fowler, Jr., and Congressman Richard Ray. Following his submission of letters to all three offices denominated Freedom of Information Act/ Privacy Act requests, petitioner invoked the judicial review provisions of the Freedom of Information Act, 5 U.S.C. § 552 (1988), and the Privacy Act, 5 U.S.C. § 552a (1988), and filed actions in the United States District Court for the Northern District of Georgia seeking injunctions ordering the congressional offices to provide to him records pertaining to him allegedly being withheld.[2]

The district court dismissed all three actions for lack of jurisdiction, because the congressional offices are components of the Congress, which is nct subject to the provisions of FOIA or the Privacy Act. The court held that "[i]nasmuch as" the congressional offices are "not an 'agency' as defined in FOIA §§ 551(1) and 552(f), FOIA and the Privacy Act would not apply to Plaintiff's requests for information, FOIA § 552(a)." Appendix to Peti-

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[1] Another petition filed by the same petitioner, seeking review of a separate order of the Eleventh Circuit, is currently pending before the Court. *Michael A. Nelson v. U.S. Department of Justice,* No. 91-1640 (S.Ct. filed Apr. 10, 1992). On April 23, 1992, the Solicitor General waived the filing of a brief in opposition to that petition, which presents different issues.

[2] Complaint at 3, *Nelson v. Senator Sam Nunn's Office,* Case No. 1:90-CV-1406-ODE; Complaint at 2, *Nelson v. Congressman Richard Ray's Office,* Case No. 1:90-CV-1422-ODE; Complaint at 4, *Nelson v. Senator Wyche Fowler's Office,* Case No. 1:90-CV-1465-ODE. In the case of Senator Nunn's office, petitioner also sought to amend his complaint to allege a failure to maintain accurate records for him in violation of the Privacy Act, 5 U.S.C. § 552a(e)(5), (g)(1)(C) & (D) (1988). Amended Complaint at 4.

tion for Certiorari ("Pet. App.") at 5, 8, 11 (typographical corrections to reflect original orders). Hence, the court held with regard to each lawsuit, "this Court does not have jurisdiction over this case in the first instance. FOIA § 552(a)(4)(B); Privacy Act § 552a(g)(1)." Pet. App. 5, 8, 11 (typographical corrections to reflect original orders).

Petitioner appealed to the Eleventh Circuit from the dismissal of his three actions. After briefing and oral argument, the court of appeals affirmed in all three cases, stating, "Because Congress is explicitly exempted from both the Freedom of Information Act and Privacy Act's disclosure requirements, *see* 5 U.S.C. § 551(1) and 552(f), we affirm the district court's dismissal." Pet. App. 1, 2, 3.

Petitioner's petition for certiorari was timely filed following the Eleventh Circuit's denial of his petitions for rehearing on March 4, 1992. Pet. App. 13, 14, 15.

REASONS WHY THE WRIT SHOULD BE DENIED

The Eleventh Circuit's affirmance on the ground that the Freedom of Information Act and Privacy Act do not apply to the Congress was correct and presents no issues warranting review.

The Freedom of Information Act imposes obligations upon "[e]ach agency" covered by the Act to "make available to the public information" meeting particular enumerated specifications. 5 U.S.C. § 552(a) (1988).

However, congressional offices are not covered by these requirements because the Congress is excepted from the definition of "agency" under the Act. Section 551 of Title 5 provides definitions for the subchapter of Title 5 that includes the Freedom of Information Act. Section 551 states, in pertinent part:

For the purpose of this subchapter—

> (1) *"agency"* means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but *does not include—*
>
> (A) *the Congress;* . . .

5 U.S.C. § 551(1)(A) (1988) (emphasis added).[3]

The final subsection of FOIA refines the application of this definition to FOIA by providing that, "[f]or purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f) (1988). Read together, section 551(1)(A) and section 552(f) unambiguously except the Congress from the reach of the Freedom of Information Act.

The Eleventh Circuit's reading of the express textual exemption of Congress from the scope of the Freedom of Information Act is consistent with this Court's prior decisions,[4] as well as those of other circuits.[5] "Since Congress is not an 'agency' " under FOIA, "documents within con-

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[3] The immediately succeeding subparagraph of section 551 excepts from FOIA "the courts of the United States." 5 U.S.C. § 551(1)(B) (1988). *See Goland v. CIA*, 607 F.2d 339, 346 (D.C. Cir. 1978) ("the FOIA's exemptions for Congress and the federal courts are *in pari materia*," citing 5 U.S.C. § 551(1)(A) & (B)), *vacated in part on other grounds*, 607 F.2d 367 (D.C. Cir. 1979) (per curiam), *cert. denied*, 445 U.S. 927 (1980).

[4] *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 145 (1980) ("[T]he Library of Congress . . . is not an 'agency' under the [Freedom of Information] Act.").

[5] *Paisley v. CIA*, 712 F.2d 686, 688 n.2 (D.C. Cir. 1983) ("Congress is not an 'agency' for purposes of that provision, *see* 5 U.S.C. § 551(1)(a) (1982) . . . ."), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984) (per curiam); *Holy Spirit Association for the Unification of World Christianity v. CIA*, 636 F.2d 838, 840-41 (D.C. Cir. 1981)("Congress has the authority to keep its records secret" because " 'agency' as defined in the Administrative Procedure Act does not include Congress," citing 5 U.S.C. § 551(1)(A)), *other portions of decision vacated and remanded as moot*, 455 U.S. 997 (1982); *Goland v. CIA*, 607 F.2d at 344 n.18 ("Congress is not an 'agency' under FOIA."); *id.* at 345 n.30 ("Congress exempted itself from the [Freedom of Information] Act's disclosure requirements; . . .").

gressional control are not subject to FOIA requests." *Paisley* v. *CIA*, 712 F.2d at 688 n.2.

Petitioner apparently doubts that Senators' and Congressmen's offices are part of the Congress. Obviously, and as petitioner surely recognizes, the Congress is composed of the Senate and the House of Representatives, which are made up, respectively, of 100 Senators and 435 Representatives. There can be no serious doubt that the offices of these Senators and Representatives are offices of the "Congress."

Petitioner's apparent view that the congressional exemption in the Freedom of Information Act applies only to auxiliary legislative branch agencies such as the Library of Congress, *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. at 145, but not to the Senate and the House themselves, Petition for Certiorari at 15–16, is refuted by common sense and by the precise text of the statute, which refers to "the Congress," 5 U.S.C. § 551(1)(A), not auxiliary legislative agencies.

Petitioner's argument is analogous to the contention that the Freedom of Information Act's exemption of "the courts of the United States," 5 U.S.C. § 551(1)(B), applies to the Administrative Office of the U.S. Courts and the Federal Judicial Center, but not to the Chambers of the Justices who comprise this Court. There can be no serious question that the textual exemption of "the courts of the United States" excludes from the Act's reach the records of Justices and judges of the federal courts. Analogously, there is no reason to review the Eleventh Circuit's unexceptionable determination that Senators' and Congressmen's offices are not covered by the Freedom of Information Act.

The Eleventh Circuit was also correct in affirming the dismissal of the petitioner's claims under the Privacy Act. Because the definition of "agency" under the Privacy Act incorporates the "agency" definition that applies to the Freedom of Information Act, *see* 5 U.S.C. § 552a(a)(1)

(1988),[6] the Privacy Act is similarly inapplicable to the offices of the Senate and the House of Representatives.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[6] Section 552a(a)(1) cross-references 5 U.S.C. 552(e). In 1986 section 552(e) was redesignated as section 552(f). Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1802(b), 100 Stat. 3207, 3207-49 (1986). Section 552a(a)(1) was inadvertently not amended to reflect this renumbering change, but section 552a(a)(1) is intended to incorporate the definition that is presently contained in section 552(f). *See* 5 U.S.C. § 552a References in Text (1988) ("Section 552(e) of this title, referred to in subsec. (a)(1), was redesignated section 552(f) of this title by section 1802(b) of Pub. L. 99-570.").